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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

CARLA A. VELASQUEZ,

Plaintiff and Appellant,

v.

CHRISTOPHER CASTANEDA
BECERRIL,

Defendant.

B285841

(Los Angeles County
Super. Ct. No. BQ057895)

APPEAL from orders of the Superior Court of Los Angeles County. James E. Blancarte, Judge. Affirmed in part, reversed in part, and remanded.

Los Angeles Center for Law & Justice, Sarah Reisman and Carmen E. McDonald; Irell & Manella, Harry A. Mittleman, Andrew J. Strabone, Grace Chuchla, and Conor Tucker for Plaintiff and Appellant.

No appearance for Defendant.

Plaintiff and appellant Carla A. Velasquez (Velasquez) appeals from an order granting her ex-boyfriend, Christopher Castaneda Becerril (Becerril)¹ joint legal custody of their two minor children after the trial court found that Becerril had committed acts of domestic violence against her. Velasquez contends the trial court failed to apply the rebuttable presumption set forth in Family Code section 3044² that it is not in a child's best interest to award joint or sole legal and/or physical custody to a parent who has been found to have committed domestic violence against the other parent, the child, or the child's siblings. Velasquez also appeals the domestic violence restraining order issued against Becerril. She contends the trial court erred by not including their minor daughter as a protected person under that order.

We reverse the order granting Becerril joint legal custody of the children and remand the matter to the trial court to apply the mandatory presumption set forth in section 3044. We affirm the domestic violence restraining order.

BACKGROUND

Velasquez and Becerril were in a seven-year relationship that ended on April 6, 2017. They have two minor children together, A and C.

On April 24, 2017, Velasquez and a friend were outside of Velasquez's home when they saw Becerril running towards them. Velasquez ran into the home, locked the door, and retreated into the kitchen where she telephoned the police. Becerril pounded on the door and rang the doorbell until Velasquez's mother opened the door. Becerril demanded that Velasquez return his credit card and identification. He proceeded to verbally disparage

¹ Becerril did not file a responsive brief in this appeal.

² All further statutory references are to the Family Code.

Velasquez and threatened to “f**k her up if I see her with another guy.” Velasquez’s brother-in-law heard the commotion and came and stood in the doorway while Becerril spoke to Velasquez’s mother.

Velasquez walked toward the door and told Becerril she would return his ID and credit card when he returned her car keys. Becerril began shouting at Velasquez but then lashed out at Velasquez’s brother-in-law, punching him in the face and causing him to stumble backward. Velasquez, her mother, and her sister then attempted to push Becerril out of the house. Becerril shoved Velasquez’s mother and attempted to punch Velasquez’s sister. He then grabbed Velasquez’s right arm and punched her on the right side of her upper back. When the family finally succeeded in ejecting Becerril from the home, he threatened to get his gang to “f**k” Velasquez up. Velasquez sustained bruises as a result Becerril’s attack.

On April 25, 2017, Velasquez filed a petition for a domestic violence restraining order against Becerril. She asked that both children be included as protected persons under the order and that the court award her sole legal and physical custody of the children. A declaration Velasquez filed in support of her petition described the April 24, 2017 incident as well as past incidents of abuse by Becerril. Velasquez stated in her declaration that on June 17, 2013, she, Becerril, and their minor child A were leaving a McDonald’s restaurant when the couple began arguing. Becerril held on to Velasquez’s belt loops so she could not run away from him and told Velasquez that she was “unappreciative” and “acting like a bitch.” When they arrived at Becerril’s apartment, Becerril would not allow Velasquez and A to leave. When Velasquez attempted to do so, Becerril punched her on the lip and on both of her ears. Becerril then slammed Velasquez against the door and slammed her head on the staircase.

Velasquez could hear A crying and yelling “Mommy.” When Becerril finally allowed Velasquez and A to leave, Velasquez went home and called the police. She obtained a restraining order against Becerril as a result of that incident.

On April 25, 2017, the court issued a temporary restraining order against Becerril, effective until May 17, 2017. The court declined Velasquez’s request to include the two children as protected persons under the order. The court granted Velasquez temporary sole physical custody of the children, and temporary joint legal custody to both parents, pending a hearing on Velasquez’s request for a permanent restraining order. The court accorded Becerril visits with the children, commencing April 30, 2017, every Sunday from noon to 5:00 p.m., and commencing on May 4, 2017, on Wednesdays from 4:00 p.m. to 7:00 p.m.

At the May 17, 2017 hearing on Velasquez’s petition, the trial court noted that a prior judicial officer had, on April 25, 2017, granted on a temporary basis some, but not all, of the restraining orders Velasquez had sought against Becerril. The court further noted that the prior judicial officer had ordered a visitation schedule for Becerril with the children and admonished both parents to adhere to that schedule.

The trial court accepted Velasquez’s declaration as her preliminary testimony in the case and viewed photographs of the injuries she sustained on April 24, 2017. Becerril denied all of the allegations against him.

At the conclusion of the hearing, the trial court took the matter under submission. In a subsequently issued written order, the trial court found that Becerril had committed the following acts of domestic violence against Velasquez: (1) On April 24, 2017, Becerril grabbed Velasquez’s right arm, causing bruising, and punched her on the upper back; (2) on June 17,

2013,³ during an argument at a McDonald's restaurant, Becerril prevented Velasquez from leaving by holding on to her belt loops; (3) after leaving the McDonald's restaurant on June 17, 2013, Velasquez and her daughter arrived at Becerril's apartment, and Becerril would not allow them to leave. When Velasquez attempted to do so, Becerril punched her in the lip and on both ears, slammed her against the door, and slammed her head on the staircase; (4) the acts of domestic violence described in paragraphs 2 and 3 were committed in the presence of A, a minor, and constituted an additional and separate act of domestic violence.

The trial court granted Velasquez's request for a domestic violence restraining order against Becerril for a period of three years, but denied her request that her two minor children be included as additional protected persons under the order. The court granted sole physical custody of the children to Velasquez, and joint legal custody to Velasquez and Becerril. This appeal followed.

DISCUSSION

I. Custody order

When deciding a petition for a domestic violence restraining order, a trial court has discretion also to make any necessary or proper order for custody of a child. (§ 3022; *Celia S. v. Hugo H.* (2016) 3 Cal.App.5th 655, 661 (*Celia S.*)). The guiding principle for the court in issuing any custody or visitation order is that the order must be in the child's best interest. (*Ibid.*)

We review the trial court's issuance of a custody order under the abuse of discretion standard. (*Ellis v. Lyons* (2016) 2 Cal.App.5th 404, 415.) "A family law court abuses its discretion if

³ Although the trial court's order states that the June 17 incidents of domestic violence occurred in 2017, the record shows that those incidents occurred in 2013.

it applies improper criteria or makes incorrect legal assumptions. [Citations.]” (*Ibid.*)

“Section 3044 establishes a rebuttable presumption that awarding physical or legal custody to a parent who has committed domestic violence is detrimental to a child’s best interest.” (*Celia S., supra*, 3 Cal.App.5th at p. 661.) Subdivision (a) of that statute in effect at the time of the hearing provides:

Upon a finding by the court that a party seeking custody of a child has perpetrated domestic violence against the other party seeking custody of the child or against the child or the child’s siblings within the previous five years, there is a rebuttable presumption that an award of sole or joint physical or legal custody of a child to a person who has perpetrated domestic violence is detrimental to the best interest of the child, pursuant to Section 3011. This presumption may only be rebutted by a preponderance of the evidence.⁴

The presumption contained in section 3044 is mandatory and a court must apply it when a finding of domestic violence has been made. (*In re Marriage of Fajota* (2014) 230 Cal.App.4th 1487, 1498 (*Fajota*).)

The trial court in this case found that Becerril committed acts of domestic violence against Velasquez but awarded Becerril joint legal custody of the children. There is no indication in the record that the trial court applied the rebuttable presumption provided in section 3044 before issuing its custody order. The trial court accordingly abused its discretion by awarding Becerril joint legal custody without applying the mandatory statutory presumption. (*Fajota, supra*, 230 Cal.App.4th at p. 1500.)

⁴ Section 3044 was amended effective January 1, 2019.

II. Restraining order

In determining whether to issue a permanent domestic violence restraining order, a court must consider whether failure to issue the order may jeopardize the safety of the petitioner and any children for whom custody or visitation orders are sought. (§ 6340, subd. (a).) We review the trial court's issuance of a domestic violence restraining order under the abuse of discretion standard. (*Nevarez v. Tonna* (2014) 227 Cal.App.4th 774, 782.) It is the appellant's burden on appeal to show that the trial court abused its discretion. (See *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1140-1141.)

The record shows that Velasquez's minor daughter A was present during the June 2013 incidents of domestic violence by Becerril against Velasquez. There is no evidence, however, that A's safety was at jeopardy during those incidents, nor is there any evidence that further contact with Becerril jeopardizes A's safety. Including A as a protected person under the restraining order would be inconsistent with the order for visitation between Becerril and the children. Velasquez does not challenge the visitation order. Given this record, we cannot conclude that the trial court abused its discretion by declining to include A as a protected person under the restraining order.⁵

⁵ At oral argument counsel for Velasquez cited *Rodriguez v. Menjivar* (2015) 243 Cal.App.4th 816 as authority for including Velasquez's daughter as a protected party in the restraining order. We find no support for that position in the cited case.

DISPOSITION

The order granting joint legal custody of the children to Becerril is reversed and the matter is remanded to the trial court to apply the mandatory presumption set forth in section 3044. In all other respects, the trial court's orders are affirmed. No costs shall be awarded in this case.

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_____, J.
CHAVEZ

We concur:

_____, Acting P. J.
ASHMANN-GERST

_____, J.
HOFFSTADT